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Recoiling from Religion

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Recoiling from Religion*

MARC O. DEGIROLAMI**

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I. INTRODUCTION

Professor Marci Hamilton has written a forceful and obviously heart-felt book that should give pause to committed champions of religious free exercise.¹ She argues convincingly that religious freedom is too

* This is an essay reviewing Professor Marci A. Hamilton’s book, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (Cambridge Univ. Press 2005).

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1. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

often invoked to shield opprobrious and socially harmful activity, and she describes numerous examples of such abuses that make any civilized person's blood run cold. Her avowed aims are to debunk the "hazardous myth"² that religion is "inherently and always good for society"³ and to increase public awareness of the dark side of religion in contemporary American public life.⁴ She advocates a restrictive constitutional test for government accommodation of religious practices and supports vesting robust discretion in the legislature to determine how that test should be administered, and by whom. To this end, she proposes a principle that measures the social harm that protection of religious belief would entail. "The right free exercise doctrine," Hamilton says, "gives a wide berth to religious belief, but follows the rule that no American may act in ways that harm others without consequence."⁵ Hamilton also repeatedly invokes the concept of the "public good," or "common good" or "public interest," as she variously calls it,⁶ to justify her restrained views of religious accommodation.

This review offers a critical appraisal of *God vs. the Gavel*, in particular of Professor Hamilton's discussion of the complicated idea of the public good and how it intersects with religious free exercise interests. In Part II, the review explains the structure of the book and the framework for Hamilton's conclusions about religious accommodation. It emphasizes several instances of Hamilton's use and explanation of the concept of the public good. Part III articulates Hamilton's general theory of the public good, breaking the concept down into several distinct categories suggested by the book itself. The review critiques the book's explanation and application of the public good principle and suggests that it is an ambiguous and unstable concept, and one that often substitutes either for particular interests or the author's policy preferences on a variety of issues.⁷ Part IV offers some observations about the principal virtue of *God vs. the Gavel*: Professor Hamilton's bracing and illuminating exposition of the recent and ongoing abuses that have been justified in the name of free exercise of religion. The

2. *Id.* at 3.

3. *Id.* at 274.

4. *Id.* Hamilton presents herself as a religious person who "like many Americans" was once a "Pollyanna when it came to religion," but has, through the crucible of her extensive experiences as a litigator against religious accommodation in a variety of contexts, realized the error and naiveté of her earlier views. *Id.*

5. *Id.* at 272. As Hamilton recognizes, the harm principle has deep roots in the political philosophies of John Locke and John Stuart Mill (as well as many others, particularly those of utilitarian persuasion) and influenced the views and attitudes of the founding era. *Id.* at 260-63.

6. Since Hamilton uses these phrases interchangeably, I will do so as well.

7. I make this claim only with reference to Hamilton's arguments about the public good, not as a general statement of skepticism about public good conceptions.

review concludes by considering whether religious interests can ever play a role in the determination of Hamilton's public good, and if so, in what way.

II. GOD VS. THE GAVEL

Hamilton divides her book into two parts. The first discusses six contexts in which religions or religious devotees have used their constitutionally privileged status to protect themselves unjustifiably or improperly advance their interests. The second sets forth the state of constitutional free exercise doctrine, with particular positive emphasis on *Employment Division, Department of Human Resources v. Smith*⁸ and *City of Boerne v. Flores*.⁹ It defends the principles underlying those cases by tracing the historic decline of the idea of religious accommodation. In the final chapter, Hamilton posits "three necessary conditions for legitimate religious accommodation," the last of which focuses on Hamilton's key concept of the public good.¹⁰

A. "God," or the Danger from Religion

Despite occasional reference to the beneficent power of religion and religious belief, *God vs. the Gavel* is about religion as a force of evil.¹¹ It is also driven by the six real life, self-consciously concretized contexts that Hamilton examines, each one chock full of actual cases and specifics. Some of the cases are ongoing and Hamilton herself has participated as an advocate in several of them. This fact-intensive approach befits Hamilton's own educative mission for the book. She is none too keen on the insulated blindness of the ivory tower; experience with actual cases, in her view, is a much needed antidote to what she believes is the commonly shared, "rose-colored," idealized conception of the role of religion in American culture.¹² Hamilton's highly contextualized approach

8. 494 U.S. 872 (1990).

9. 521 U.S. 507 (1997). Hamilton represented the City of Boerne, Texas, which prevailed. *Id.* at 509, 536.

10. HAMILTON, *supra* note 1, at 275.

11. See, e.g., *id.* at 4-5, 7, 306. "Were all religious institutions and individuals always beneficial to the public, this book would not be needed." *Id.* at 273.

12. *Id.* at 7-8. Her preference for the experiential over the theoretical, or at least her belief that these perspectives can be profoundly opposed ways of looking at the world, appears in her other work and is a relevant theme for this review. See, e.g., Marci A. Hamilton, *What Does Religion Mean in the Public Square?*, 89 MINN. L. REV. 1153,

informs approximately two-thirds of the book. She explores in these sections the harmful role that religious institutions have played in the lives of children and the active debates about marriage, land use, schools, prisons and the military, and discrimination.

Hamilton begins with the sexual and physical abuse of children by persons either operating under religious auspices or motivated by religious belief. She provides several examples of misused religious authority that have led to the tragic and horrifying abuse of children, offering newspaper-style summaries of the facts and litigation history of past and ongoing cases.¹³ She also excoriates religious institutions for “actively aid[ing] and abet[ting] the abuse,”¹⁴ though what she generally means is that the institutions’ reaction to evidence of abuse was often to suppress the evidence and insist on silence in an effort to protect their finances and public image.¹⁵ Hamilton bristles with indignation at the abuses and the cover-ups, and at this point the building blocks of her general theory of religious accommodation begin to appear: “A church does have the right to believe at will, but it has no right to use those beliefs to justify illegal conduct. In effect, this reading [the one she opposes] of the First Amendment immunizes actions that display callous disregard for society’s most important norms.”¹⁶ After her comparatively lengthy treatment of sexual abuse, Hamilton discusses several other issues relevant to the welfare of children, including medical neglect,¹⁷ child abandonment,¹⁸ physical abuse,¹⁹ and failure to provide a safe environment for children.²⁰ She peppers each topic with highly disturbing accounts of child exploitation in the name of religious freedom.

1157-58 (2005) (reviewing JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2004) and stating that “[Stout] is an ethicist who has resolutely refused to lock himself into the ivory tower to construct the theory that ‘explains it all,’ and instead, by walking among his fellow citizens, has identified a complex discourse, incapable of being captured by an either/or formula”). There is more than an element of self-effacement and irony in her position on this issue. Hamilton is herself a prominent legal academic whose views on religious accommodation have changed dramatically over the years. See Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 *LAW & CONTEMP. PROBS.* 359 n.89 (2000) (attributing her old views to “the musings of a young and ill-informed scholar, too much at home in the ivory tower”).

13. E.g., HAMILTON, *supra* note 1, at 13-25.

14. *Id.* at 14; see also *id.* at 30.

15. *Id.* at 14-15. Though Hamilton does not discuss it in her examples, a stronger case for “actively aiding and abetting” might be made where an institution reassigns a cleric, knowing of his past abuse of children, to a different community without warning the new community.

16. *Id.* at 26.

17. *Id.* at 31-39.

18. *Id.* at 39-40.

19. *Id.* at 40-44.

20. *Id.* at 44-46.

How is it that U.S. law and society have failed to protect these children? The answer, Hamilton claims, lies in the historic misuse of the First Amendment to shield religious organizations from liability for the harm they do. According to Hamilton, this “false understanding of free exercise” was finally rectified in the Supreme Court’s *Smith* decision, which “explained that neutral, generally applicable laws certainly can be applied to religious conduct.”²¹

Further fault lies in two fallacies of the popular imagination: the American love affair with religion already mentioned and the belief that contemporary society is hostile to religion and religious values. Hamilton blames certain academic voices for feeding into these misapprehensions.²² Her *bête noire* on this score is Professor Stephen Carter’s *The Culture of Disbelief*,²³ which she claims misrepresents the realities that most people in the country are religious believers,²⁴ that religious viewpoints “fill the public square,”²⁵ that religion is not “always moral . . . [or] as innocuous as apple pie,”²⁶ and that religious interests are not “politically powerless.”²⁷ Hamilton contends that the perpetuation of these myths by Carter and others has enabled religious organizations to stage a kind of socio-legal power grab, all the while maintaining the appearance of weakness.²⁸

All of this is rather hasty. Nowhere in his book does Carter claim that most people in the country are not religious or that religion does not affect the public views of many Americans or that religious interests are politically powerless:

[R]eligion matters to people, and matters a lot. Surveys indicate that Americans are far more likely to believe in God and to attend worship services regularly than any other people in the Western world. True, nobody prays on prime-time television unless religion is a part of the plot, but strong majorities of citizens tell pollsters that their religious beliefs are of great importance to them in their

21. *Id.* at 47. *Smith* held that the Free Exercise Clause was not offended by Oregon’s criminalization of the religiously inspired use of peyote by certain Native Americans. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990). After the plaintiffs were fired from their jobs, the state denied them unemployment benefits. *Id.* at 874.

22. See *infra* notes 23-28 and accompanying text.

23. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

24. HAMILTON, *supra* note 1, at 7.

25. *Id.*

26. *Id.* at 48.

27. *Id.* at 291.

28. *Id.*

daily lives. . . . And today, to the frustration of many opinion leaders in both the legal and political cultures, religion as a moral force and perhaps a political one too, is surging.²⁹

Likewise, though Carter certainly does discuss at length the moral dimensions of religious belief and its important role in American public life, he does not claim that religion always and everywhere has been benign or that it should be unthinkingly embraced:

The religions enjoy no special immunity from the tendency of power to corrupt—and of absolute power to corrupt absolutely. As I write these words, people are being slaughtered for their religious beliefs in India, in Bosnia, and in various parts of the Middle East. Closer to home, . . . the African slave trade and the post-Civil War oppression of the freed slaves and their progeny were often justified by a variety of Scriptural passages and Christian doctrines. Indeed, there is virtually no evil that one can name that has not been done, at some time and at some place and to some real person, in the name of religion.³⁰

It is true that Carter advocates a prominent place for religious thought and belief in the public square, but he also says:

Yet one who argues, as I do, for a strong public role for the religions as bulwarks against state authority must always be on guard against the possibility—no, let us say the likelihood—that some religions will try to use the privileged societal position that the First Amendment grants them as an instrument of oppression.³¹

The point of this seeming petulance is certainly not to engage Hamilton in a game of “gotcha” with respect to what may generously be called an incidental point in her argument. It is instead to note a leitmotiv in her presentation of ideas, and one which will resurface at the climactic point when she must defend her own crucial concept of the public good. It is this: Hamilton comes on very strong, often exuding an insistent and facile certitude about the particular policies she favors. This is understandable given her profound involvement in a long-running, “fundamental difference of opinion”³² between Congress and the Supreme Court that began in 1990, and her sincere belief in the rightness of *Smith* and *Boerne*.³³ Her passionate voice makes for stimulating reading, particularly when it comes to the specifics of the gripping cases and legislative histories with which she has developed

29. CARTER, *supra* note 23, at 4.

30. *Id.* at 83 (footnote omitted).

31. *Id.* at 85. In considering the problems involving teaching about religion in public school, Carter emphasizes that students should study the negative as well as positive role of religion in American history. *Id.* at 207; see also Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1257 (2002).

32. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 153 (1997).

33. HAMILTON, *supra* note 1, at 214.

such mastery. But it is less effective when she presents and analyzes concepts relevant, either because she opposes or espouses them, to her philosophical and constitutional views.³⁴

Hamilton's chapter on marriage provides a useful example of this phenomenon. The first subpart treats gay marriage and addresses the Massachusetts Supreme Judicial Court's (SJC) well-known decision³⁵ and the federal legislature's critical response in 2004.³⁶ Hamilton makes plain that she sides with the SJC and the right of gay people to marry. She believes that those opposed to gay marriage are interposing their religious beliefs where they have no business and are thereby subverting the public good: "Once the debate cannot be framed by one religious tradition, the door has been opened to a more appropriate public debate over the common good."³⁷ Hamilton roundly criticizes the views of Professor Robert P. George, a prominent natural law theorist who opposes gay marriage. Relying on George's comments in a *Wall Street Journal* op-ed, Hamilton characterizes the natural law position on gay marriage by remarking:

Apparently, [according to natural law] the physical characteristics of males and females predetermine the law of marriage. [George's] circular reasoning implies that no legislature should consider the issue other than to reach his religiously based conclusion, a conclusion once again that is an argument from theocracy, not public policy. Accordingly, he promoted the idea of a federal constitutional amendment to ban all marriages other than those between a man and a woman, without entering into the debate over what forms of marriage are best for children, the economy, or the public good. His is a revealed legal regime, not a reasoned one.³⁸

34. See Steven D. Smith, *Losing Jerusalem—RFRA and the Vocation of the Legal Crusader*, 39 WM. & MARY L. REV. 907, 913-14 (1997).

Her [the legal scholar/crusader's] vocation mixes the role of scholar and advocate in a way that can easily end up doing violence to both. Typically she will not feel free simply to pursue truth wherever the search may lead. Her "truths" must be ones that speak to current controversies as currently formulated—otherwise she will not be participating in the legal conversation—and they will need to favor the righteous side of those controversies. Uncooperative truths will be of little value, or even of negative value.

Id. (footnote omitted). Professor Smith's article was part of a symposium entitled "Reflection on *City of Boerne v. Flores*," but there is no indication that he was referring specifically to Professor Hamilton in these remarks.

35. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

36. HAMILTON, *supra* note 1, at 51-53.

37. *Id.* at 57.

38. *Id.* at 53-54.

One need not be a natural law expert to sense that much is missing in this assessment. Hamilton's spare statements about the bases for opposition to gay marriage from a natural law perspective³⁹—that its position is “revealed” rather than “reasoned,” and that it prescind from the debate over the common good—are, respectively, incomplete and flatly incorrect. It is true that the *Summa Theologiae* was intended by Aquinas primarily as a teaching tool for those sharing his religious beliefs,⁴⁰ and that natural law theory historically has been associated with Roman Catholic teaching.⁴¹ But to say that a position based in natural law is not “reasoned” but “revealed” is to ignore the highly rational, practical impetus that adherents claim drives the natural law tradition. John Finnis, perhaps the most famous, recent exponent of natural law, who also opposes homosexual marriage,⁴² is emphatic that “practical reason,” not revealed truth, is the guiding principle by which people may decide what is moral.⁴³ Of marriage, Finnis says:

The good of marriage is one of the basic human goods to which human choice and action are directed by the first principles of practical reason. . . .

. . . .

. . . [T]he good of marriage [is] the way of life made intelligible and choiceworthy by its twin orientation towards the procreation, support and education of children and the mutual support and amicitia [friendship] of spouses who, at all levels of their being, are sexually complementary.⁴⁴

39. It is misleading to speak of a monolithic “natural law view,” as there is great variety within the modern tradition alone, to say nothing of the tradition dating from Aquinas. The natural law theory of John Finnis, Robert George, and Germain Grisez is not that of Lloyd Weinreb, or Michael Moore, or Mark Murphy, and so on. Moreover, the phrase “natural law” is itself commonly used in widely divergent meta-ethical senses. See Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY* 188, 190-92 (Robert P. George, ed. 1992) (listing four different such usages, only one of which is tied directly to the idea that “the nature of moral qualities like goodness is given by their having been commanded by God”).

40. Mark C. Murphy, *Natural Law Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 15, 17 (Martin P. Golding & William A. Edmundson eds., 2005).

41. See Kent Greenawalt, *Natural Law and Public Reasons*, 47 *VILL. L. REV.* 531, 541 (2002).

42. E.g., John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 *AM. J. JURIS.* 97, 99 (1997).

43. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-01 (1980). For a different, highly persuasive perspective, but one that also emphasizes the connection between religion and rationality, see Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 *WAKE FOREST L. REV.* 449, 464 (2001) (arguing that because of the strong bond between “revelation” and “reason,” contemporary Christians should be leery of banning or disfavoring conduct if “(a) the belief is the subject of increasingly widespread intradenominational disagreement among Christians themselves and (b) no persuasive argument grounded on contemporary human experience supports the belief”).

44. Finnis, *supra* note 42, at 97, 118 (arguing for an interpretation of Aquinas

In criticizing this position, it is possible that Hamilton means to say that the natural law view of gay marriage, accepting for the sake of this point that Finnis's and George's position is representative, is not accessible to people who do not share certain religious convictions, and so should not be relied upon in political decisionmaking. This argument would be reminiscent of Professor Kent Greenawalt's reflections about whether nonaccessible grounds should be excluded as bases for political decisions.⁴⁵ Greenawalt also discusses the difficulties in disentangling the religious and nonreligious reasons that may jointly inform a particular political judgment.⁴⁶ Hamilton might be arguing for the exclusion of any political judgment whose basis cannot be entirely disentangled from religious belief because religious beliefs are not accessible, and therefore any judgment that implicates religious belief is not accessible. But if Hamilton intended to proceed along this line of inquiry—that is, with an eye toward arguing for the total exclusion of the influence of religious belief from public political judgment (or debate)—then it is odd that she unequivocally rejects the plausibility of such an approach.⁴⁷

along these lines). For George's substantial agreement about the "intrinsic human good" of marriage see Robert P. George, *What's Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 70-72 (2004).

45. He writes:

What I mean by "not generally accessible" . . . [is that] the believer lacks bases to show others the truth of what he believes. . . .

. . . This does not mean that reason plays no part in the development of religious convictions. Possible religious understandings may be measured against various tests of reasonableness. But something more is involved: a choice or judgment based on personal experience that goes beyond what reason can establish.

KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 39-40, 85-95 (1995). A belief based on revelation would in most circumstances not be accessible, unless the believer can point to a historical, evidentiary record to support it. *Id.* at 41.

46. See, e.g., *id.* at 88-89. Taking as his departure point the natural law view that "virtually all . . . ethical and political truths are accessible to common human reason, [and] that understanding these truths does not require an understanding of religious truth," Greenawalt dissects the problem of intertwining bases of belief:

In my discussion of what constitutes reliance on religious grounds in chapter 6, I mentioned how religious premises may intertwine with naturalist reasoning I also mentioned a second problem, that people may believe natural arguments are sound because of religious authority, not because they perceive the intrinsic force of the arguments. A third problem is a variation on the second; someone might find the natural arguments *somewhat persuasive* by themselves, but be *much more certain* of their truth because of religious belief.

Id. at 88.

47. HAMILTON, *supra* note 1, at 293; see also Hamilton, *What Does "Religion"*

Perhaps Hamilton means that although the Finnis/George view of gay marriage is at some remote level accessible, it is not persuasive on grounds of reason *alone*. For example, Hamilton might claim that she, like many others, cannot reconcile the Finnis/George position by reference to pure reason and that she therefore suspects that religious convictions are lurking in the background. Hamilton might say that though the natural law proponent starts with a principle that most people would accept as rational, for example, “one of the primary goods of marriage is procreation,” he reaches, through a step-by-step process of what he claims is “reasoning,” conclusions that are highly controversial and not commonly shared, for example, “homosexual marriage is morally wrong.” To this, the natural lawyer might reply that his beliefs *are* rationally discoverable by all persons, but that the measure of their objective truth is not taken by reference to what most people happen to believe.⁴⁸ It therefore still remains for Hamilton to make clear why the Finnis/George position on homosexual marriage cannot be explained by reason alone. She might claim that the kind of reasoning deployed to justify the Finnis/George view is altogether too categorical and abstract, that it draws arbitrary and implausible distinctions and that it does not give enough weight to real-world experience.⁴⁹

Mean in the Public Square?, *supra* note 12, at 1158 (“No matter how finely spun the theories that require reason and reason alone to ground public policy are, there has never been a time in the United States when religion has not been a driving force behind social policy, let alone altogether excluded.”). Hamilton contends that Greenawalt endorses the exclusive position, HAMILTON, *supra* note 1, at 292-93, but this is a misreading. See Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 404, 411 (2001):

My own answer to the place of religious grounds is an intermediate one

. . . . I believe legislators [Greenawalt distinguishes between officials and citizens, and then again among officials between legislators and judges] should give greater weight to reasons that are generally available than to reasons they understand are not generally available. But some reliance on religious reasons is appropriate, especially since the generally available reasons are radically indecisive about some crucial social problems.

Id.

48. FINNIS, *supra* note 43, at 30.

49. See Kent Greenawalt, *How Persuasive Is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1667-71 (2000).

No doubt, the vast majority of the population could be under an illusion, and a plausible theory of why that might be so [for example, that advanced by natural law] should make us more likely to think that most people suffer in this way than if no such theory were available. But it is also true that coherent theories that have seemed convincing at one time appear to be shot with error, even ridiculous, at a later time. As moral agents, we must choose between the weight to give to theory and the weight to give to experience when the two conflict.

Id.

If Hamilton were to accept this argument, her second criticism of the Finnis/George position on gay marriage, that it does not engage with concrete “public policy” issues, could resurface at this point. Hamilton might say that it is in the consideration of real-world experience that one is most rational about the common good.⁵⁰ Greenawalt might agree: he has said in the context of assessing the rationality of natural law’s claims about the wrongfulness of homosexuality and its implications for same sex marriage⁵¹ that “we have sounder and less sound ways to reason about moral matters, and . . . an approach in which experience receives greater weight is sounder than highly abstract, categorical analysis.”⁵²

But whatever the plausibility of this argument, the “common good” is a concept of vital importance in the natural law views of George and Finnis; it relates to the rational pursuit of self-evident human goods, which itself implies some kind of appeal to tangible and accessible evidence.⁵³ Consideration of the “good of marriage” by reference to “what forms of marriage are best for children,” either from a theoretical or an experiential point of view, is precisely what the natural law has in mind.⁵⁴ Nevertheless, if Hamilton had wanted to take on the Finnis/George

50. Indeed, such a position would be consistent with Hamilton’s generally practical-minded, experience-based approach throughout the book.

51. Greenawalt is primarily addressing the natural law position that consenting homosexual acts are morally defective, rather than any resulting implications of that position for criminal penalties or same sex marriage. *Id.* at 1666. Nevertheless, his treatment of this issue often spills into a discussion of the good of marriage, particularly the good of sexual intercourse within marriage. *Id.* at 1669.

52. *Id.* at 1673.

53. See, e.g., FINNIS, *supra* note 43, at 134-60; Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 19 (2000). I mean “self-evident” in the way Finnis uses that term. A proposition is self-evident if it is not rationally derivable from some other proposition. FINNIS, *supra* note 43, at 70. Self-evidence in this sense does not necessarily entail universal acceptance because people may be deceived for a variety of reasons.

54. It is not clear whether Hamilton would include the “good” of procreation on her list, but in American law historically it has certainly been counted important as a *public* good. Procreation has been deemed a fundamental private good as well, but that is not relevant for this discussion. See, e.g., *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) (stating that “procreation of offspring could be considered one of the major purposes of marriage”); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (observing that a “state has a compelling interest in encouraging and fostering procreation of the race”), *aff’d*, 673 F.2d 1036 (9th Cir. 1982); *Baker v. Baker*, 13 Cal. 87, 103 (1859) (“[T]he first purpose of matrimony, by the laws of nature and society, is procreation.”); *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. 1960) (“One of the primary purposes of matrimony is procreation.”); *Lyon v. Barney*, 132 Ill. App. 45, 50 (1907) (“[T]he procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage”); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich.

position as I have suggested, she might have found an inquiry into the theoretical/experiential bases of reason and the public good a fruitful one.

This is not the place for full assessments of these difficult views and Professor Hamilton is, of course, at liberty to disagree with George's rejection of gay marriage as inconsistent with the common good. But Hamilton's critique of natural law theory as sub- or supra-rational requires greater elaboration and it is hard to know what to make of her claim that natural law fails to account for the common good. Again, these may appear to be quibbles about nonessential matters, but they are germane to Hamilton's explanation and defense of her own public good concept.

Hamilton concludes Chapter Three with a discussion of polygamous marriage.⁵⁵ After presenting Mormon arguments for the legal protection of polygamy, and noting that there is no constitutional right to polygamous marriage, Hamilton poses three nearly identical tests for measuring whether polygamy should be accommodated: (1) "[t]he question is not whether polygamists may trump the law, but rather whether polygamy can coincide with the public good";⁵⁶ (2) "[t]he question for public policy is whether the practice of polygamy is consistent with what is best for society, period";⁵⁷ and (3) "[legislators] must also always ask whether the conduct in question comports with the public good, and that means they must examine with some care how the

1940) (stating that "procreation of children is one of the important ends of matrimony"); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *appeal dismissed*, 409 U.S. 810 (1972); *Frost v. Frost*, 181 N.Y.S.2d 562, 563 (N.Y. Sup. Ct. 1958) (discussing "one of the primary purposes of marriage, to wit, the procreation of the human species"); *Ramon v. Ramon*, 34 N.Y.S.2d 100, 108 (N.Y. Fam. Ct. 1942) ("The procreation of off-spring under the natural law being the object of marriage, its permanency is the foundation of the social order."); *Matchin v. Matchin*, 6 Pa. 332, 332 (1847) ("The great end of matrimony is . . . the procreation of a progeny having a legal title to maintenance by the father."); *Grover v. Zook*, 87 P. 638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children."); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage.").

None of this, of course, necessarily speaks to whether homosexual marriage threatens the public procreative aim of marriage (the advent of reproductive technologies, such as in vitro fertilization, may be relevant in assessing this issue), or whether the public good of marriage has in some way changed so as to render procreation less vital.

55. HAMILTON, *supra* note 1, at 66-77.

56. *Id.* at 68.

57. *Id.* at 72-73.

conduct impacts others.”⁵⁸ Hamilton appears to have answered these questions for herself. She observes that many people believe that polygamy perpetuates inequalities between the sexes and may be inconsistent “with the rule of law and democracy.”⁵⁹ Other topics relevant to assessing the “public good” of polygamy, according to Hamilton, should include its unclear impact on issues of child custody, inheritance, and even the spread AIDS in Africa.⁶⁰

Hamilton’s own legal expertise is showcased in Chapter Four, which describes the conflicts that arise when religiously inclined land owners seek to use their property in ways that threaten the character of residential communities. She has considerable experience litigating these cases, most often representing the party opposing the religious accommodation, that is, the locality or the neighbors.⁶¹ She describes vividly the acrimony generated by these disputes: a religious person who wishes to expand his home to accommodate greater numbers of worshippers; the often enormous increase in traffic and commerce such plans mean for a residential neighborhood;⁶² the transformation of a once-a-week house of worship into a “multiple-use social center;[]”⁶³ the arrival of the homeless into residential areas, seeking food, shelter, and spiritual guidance, and the resulting deterioration of the neighborhood;⁶⁴ and the inevitable legal entanglements and concomitant ill will among neighbors, including charges of discrimination.⁶⁵

Hamilton blames these problems, and many others for what she believes is overzealous religious accommodation, on two federal statutes: the Religious Freedom Restoration Act of 1993 (RFRA),⁶⁶ which was partially struck down in *City of Boerne v. Flores*,⁶⁷ and the Religious

58. *Id.* at 77.

59. *Id.* at 74.

60. *Id.* at 76. Hamilton’s claims against polygamy include the rhetorical question: “If a man can marry as many women as he wants, will there ever be a solution to the endemic problem of AIDS in Africa?” *Id.*

61. *Id.* at 84, 106; *see also* *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

62. HAMILTON, *supra* note 1, at 80.

63. *Id.*

64. *Id.* at 100-01.

65. *Id.* at 97-98.

66. 42 U.S.C. §§ 2000bb to bb-4 (2000).

67. 521 U.S. 507, 536 (1997). RFRA was invalidated as exceeding Congress’s power over the states under section 5 of the Fourteenth Amendment; it may remain applicable as to the federal government. *Cutter v. Wilkinson*, 544 U.S. 709, 715 n.2 (2005) (noting that several courts of appeals have so held, but expressing no view on that question).

Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁶⁸ RLUIPA requires that if the state passes a land use law that imposes a “substantial burden” on the religious use of property, it must demonstrate that the law serves a compelling state interest and is the least restrictive means of furthering that interest.⁶⁹ With more than a hint of bitterness,⁷⁰ Hamilton argues that Congress abdicated its responsibilities to the common good because it failed properly to explore the likely effects of RLUIPA on the rights of homeowners and the relationships among neighbors. She concludes, “RLUIPA has turned neighbor against neighbor and is one of the most religiously divisive laws ever enacted in the United States.”⁷¹

It bears reflection whether the antagonisms that Hamilton identifies were simmering well before the two statutes were passed. RLUIPA may have changed the legal landscape, but it seems doubtful, or at least Hamilton has not made a strong case for the position, that RFRA and RLUIPA created or even significantly exacerbated the hostilities between these competing interests. “[D]ivisive religious discord”⁷² about the proper use of land is a product of conflicting private interests and beliefs about the good life. As Hamilton suggests, that strife may be driven by the evolving nature of religious practice in America and its incompatibility with other, competing interests such as traditional notions of home ownership, the desire for a certain kind of neighborhood character, or a municipality’s wish to control expansion.⁷³ Still, Hamilton’s criticisms of RLUIPA as a potentially aggravating force in this process ring at least partially true: by imposing a heavier burden to justify land use laws affecting religious institutions, RLUIPA *could* give religious institutions an advantage, or at least a standing, that they previously may

68. 42 U.S.C. §§ 2000cc to cc-5 (2000).

69. § 2000cc(a)(1).

70. She states:

In 2000, President Bill Clinton (who never met a religious cause he would not support as President), signed RLUIPA, saying: “Today I am pleased to sign [RLUIPA] into law . . . which will provide important protections for religious exercise in America.” Then he praised the usual suspects behind such legislation, Senators [Orrin] Hatch and [Edward] Kennedy. (It has not been done yet, but one could write a book about their partnership benefiting religious entities). Not skipping a beat, he then thanked the religious groups . . . and the civil rights communities for “crafting this legislation.”

. . . To state his point a little more clearly, this was special interest legislation, drafted outside Congress and then passed because the members and the President believed the right people were behind it, not because they had determined independently that it was a good law for the people.

HAMILTON, *supra* note 1, at 96 (footnote omitted).

71. *Id.* at 97.

72. *Id.* at 103.

73. *Id.* at 79-82.

not have enjoyed.⁷⁴ Yet this is hardly the same as contending that such an advantage demonstrates that the public good has been disserved or ignored. It simply demonstrates that Congress has made a choice about where the public good lies. Undoubtedly, providing an attractive haven for the homeless or encouraging the establishment of institutions that will see to their spiritual and physical needs will displease neighboring landowners. Their property values will probably suffer and the character of their neighborhoods will change in ways they are unlikely to appreciate. But it would not be unreasonable, or an obvious capitulation to special interests, for a legislator to conclude that these measures would nevertheless advance the public good.

Similarly, though Hamilton is dismissive on this front,⁷⁵ the RLUIPA legislative record “contained statistical, anecdotal and testimonial evidence suggesting that [religious] discrimination is widespread and typically results in the exclusion of churches and synagogues even in places where theatres, meeting halls, and other secular assemblies are permitted.”⁷⁶ Hamilton disagrees with this characterization of the record, argues that allegations of discrimination were fabricated or inflated for political advantage, and believes that relevant voices were not consulted.⁷⁷ These evidentiary arguments may have some merit but they do not bear on her theoretical claims about what is best for American society. Examining Hamilton’s larger, theoretical arguments requires an assumption that the evidence for RLUIPA was as Congress believed it to be; only then is it possible to discern precisely what Hamilton means by invoking the concept of the public good to support her claim that Congress ignored it.⁷⁸

74. The weight of the additional burden will depend on an individual state’s religious accommodation laws. Many states have zoning laws favorable to religious interests. See Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 539 (1968) (“The greatest number of zoning ordinances grant special exemptions for churches in residential areas provided they do not cause traffic hazards, congestion, or excessive and untimely noise.”). Furthermore, Hamilton points out that various states have passed their own RFRAs, and though some provide various exemptions, several others do not. HAMILTON, *supra* note 1, at 182-84. For those states with their own RFRAs, particularly for those with no or few exemptions (or for exemptions other than for prisons and land uses), RLUIPA imposes no additional burden.

75. *Id.* at 103-04.

76. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004).

77. See, e.g., HAMILTON, *supra* note 1, at 150-56.

78. It could be argued that *if* Congress’s primary goal in passing RLUIPA was to eliminate religious discrimination *and* there is absolutely no evidence of any religious

Hamilton's discussion of RFRA's and RLUIPA's effect on the prison system is at once fascinating and slightly irritating. She begins the chapter by detailing the despicable activities and recruiting tactics of prison gangs and white supremacist organizations.⁷⁹ However, other than a lonely quote from an Aryan Brotherhood member that an act of killing is rewarding because "it's a holy cause,"⁸⁰ the connection between these groups' activities and their religious motivation is not readily apparent from Hamilton's treatment. In fact, one senses that Hamilton may be overreaching in arguing for a pervasive link in order to lend rhetorical support to her opposition to RLUIPA and religious accommodation generally. To be clear, I am not suggesting that such connections do not exist; they do. Some white supremacists do derive their views from religious organizations, such as the Church of Jesus Christ Christian, Aryan Nation. I mean only to point out that the book's portrait of the activities of white supremacist gangs, in and out of prison, does not make clear whether religious convictions are, as a general matter, of crucial importance to white supremacist beliefs. Still less clear is the effect that RFRA or RLUIPA has had on the proliferation of white supremacist belief or violence.

Hamilton's evidence that prisons have become a breeding ground for radical Islamic organizations is much more compelling. Also compelling is the connection between many prisons' failure to recruit Muslim imams and the consequent infiltration of extremists who are more likely to distort Islamic belief and inflame the hatred of those already susceptible to terrorist indoctrination.⁸¹ Against the backdrop of these two problems, Hamilton again launches into a diatribe against RLUIPA: the Act was a craven capitulation to special interests, its likely effects were not adequately investigated, contrary views were not sought, and the public good was ignored.⁸² Hamilton is rather heated here, concluding with the confident prediction that the Supreme Court would in short order strike down RLUIPA.⁸³ The Supreme Court unanimously disagreed with her in *Cutter v. Wilkinson*, holding that section three of RLUIPA, governing

discrimination, RLUIPA then fails to serve the public good because it targets a problem that does not exist and possibly creates an additional source of strife. I doubt, however, that even Hamilton would argue for such a categorical view either of Congress's intentions in passing RLUIPA (the potential for discrimination is only one reason to favor religious accommodation) or of the total absence of any evidence of religious discrimination.

79. *Id.* at 141-44.

80. *Id.* at 143.

81. *Id.* at 144-49.

82. *Id.* at 150-56.

83. *Id.* at 155 ("The Supreme Court will decide by July 2005 whether [RLUIPA] is constitutional. (It's not.)").

persons confined to institutions, did not violate the Establishment Clause.⁸⁴

In answer to the question, “How much trouble can religious accommodation [in prison] be?”⁸⁵ Hamilton reels off an impressive and extremely amusing list of sundry dietetic, grooming-related, literary, and sartorial requests made by prisoners on the ostensible basis of religious belief.⁸⁶ The Church of the New Song, for example, insists that its adherents be served sherry and steak every Friday at 5:00 p.m. in order to participate in the “celebration of life.”⁸⁷ Hamilton cleverly uses this absurd case as a foil for her anti-accommodation arguments, but at least some of these gross abuses, as well as the cases of dangerous activity in the name of religious belief, could be dealt with by applying *Cutter’s* observations about institutional competence:

It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials’ expertise in this area. Further, prison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular practice is “central” to a prisoner’s religion, the Act does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.⁸⁸

Hamilton would likely disagree with this dicta from *Cutter*. She would contend that courts are institutionally incompetent to perform these kinds of inquiries; only the legislature, free from the sway of special interests, is capable of protecting the public good.⁸⁹ Before turning to the now long-forestalled exploration of Hamilton’s concept of the public good, in which her fondness for individualized legislation is discussed, a word about the second part of her book is necessary.

B. “The Gavel,” or Protecting Ourselves from Religion

Part Two of the book primarily concerns Supreme Court doctrine and constitutional history. Hamilton divides the Supreme Court’s free

84. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Hamilton is also in the substantial minority of scholars who believe that RLUIPA violates the Establishment Clause. See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 745-46 nn.222 & 223 (2005).

85. HAMILTON, *supra* note 1, at 156.

86. *Id.* at 157-61.

87. *Id.* at 163, 165.

88. *Cutter*, 544 U.S. at 725 n.13 (citations omitted).

89. HAMILTON, *supra* note 1, at 212.

exercise jurisprudence into a “dominant” and a “competing” doctrine. The dominant doctrine consists of two principles: (1) “religious entities, just as much as any other citizen, can be forestalled and prohibited from harming others and thus can be made to obey a myriad of laws”; and (2) religious institutions must not be “subjected to laws that are hostile or motivated by animus toward religion in general or any sect in particular.”⁹⁰ The dominant doctrine first appeared in *Reynolds v. United States*,⁹¹ a case upholding a federal antipolygamy law. Because the statute did not target Mormons in particular, but merely expressed a neutral public policy preference against polygamy, Hamilton argues, the law satisfied both strands of the dominant doctrine.⁹² In contrast, Hamilton contends that where religious animus is “patent,” as in *Church of the Lukumi Babalu Aye v. City of Hialeah*,⁹³ the second strand of the dominant doctrine is violated and courts may properly intervene. The Court’s “competing” doctrine is an aberrant strain of free exercise cases that applies strict scrutiny, at least in name,⁹⁴ to generally applicable, neutral laws.⁹⁵ The competing doctrine was repudiated in *Smith*, “and the rule of law prevailed.”⁹⁶

90. *Id.* at 210-11.

91. 98 U.S. 145 (1878).

92. HAMILTON, *supra* note 1, at 211.

93. 508 U.S. 520 (1993). In fact, the conclusion that the city of Hialeah displayed anti-religious motive only received two votes. *Id.* at 540-42 (Kennedy & Stevens, JJ.). The basis for the Court’s holding was that the city ordinance was not of general applicability: it gave greater protection to nonreligious killing of animals than to religiously motivated animal sacrifice. *Id.* at 533-40.

94. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1127-28 (1990) (arguing that though the courts have claimed to apply strict scrutiny in these contexts, their review is often less rigorous).

95. The “competing doctrine” cases in which the religious interest prevailed comprise the “literal handful” listed by Hamilton: *Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829, 835 (1989) (“[T]here may exist state interests sufficient to override a legitimate claim to the free exercise of religion. No such interest has been presented here.”); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (applying strict scrutiny to a denial of unemployment benefits to a person discharged for refusal to work on the Sabbath); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (applying strict scrutiny to a denial of unemployment benefits to a person who refused to make armaments due to a religious belief); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

There is a handful of other cases in which the Court also applied strict scrutiny but where the religious interest lost. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 394-97 (1990) (holding that a generally applicable sales tax used as against religious materials survived strict scrutiny); *Hernandez v. Comm’r*, 490 U.S. 680, 700 (1990) (holding strict scrutiny satisfied in denial of charitable deduction to Church of Scientology for training sessions); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that a denial of tax exemption to university that refused admission to anyone involved in interracial marriage survived strict scrutiny); *United States v. Lee*, 455 U.S. 252, 260 (1982) (holding that a requirement to participate in social security survived strict scrutiny as applied to an individual whose religious belief prohibited

Congress reacted rapidly to *Smith*, as *Smith* itself obliquely suggested that it might,⁹⁷ by enacting RFRA, whose flaws by Hamilton's lights have already been discussed. The Supreme Court in *Boerne* responded by invalidating RFRA as it applied to states and localities on federalism grounds. Hamilton attributes Congress's RFRA "overreaching" to a kind of swollen ego. That is, Congress's historic successes in enacting civil rights legislation in the sixties, and the deference accorded that legislation by the courts, grew into "dogmatic belief in the unassailability of whatever Congress attempted."⁹⁸

The trend seemingly signaled by *Smith* and *Boerne*, hailed by Hamilton as manifesting the proper exercise of judicial constitutional oversight, was dealt a blow by *Cutter v. Wilkinson*. Relying on the principle that there is "room for play in the joints" between the Establishment and Free Exercise Clauses,⁹⁹ the Court held that Congress's special solicitude for the religious interests of institutionalized persons was constitutional. It may be argued that the Court's treatment of RLUIPA in this context is unique because the government's control over institutionalized persons is "severely disabling" to religious interests.¹⁰⁰ However, the Court's "foremost" reason for upholding RLUIPA—that it "alleviates exceptional

participation). Presumably Hamilton would be as opposed or only slightly less opposed to the analytical approach endorsed by these cases as she is to those in which the religious interest prevailed. See *Employment Div. v. Smith*, 494 U.S. 872, 896-97 (1990) (O'Connor, J., concurring).

Moreover, in each of the other cases cited by the Court to support its categorical rule [including *Lee*], we rejected the particular claims before us only after carefully weighing the competing interests. That we rejected the free exercise claims in those cases hardly calls into question the application of First Amendment doctrine in the first place. Indeed, it is surely unusual to look at the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

Id.

96. HAMILTON, *supra* note 1, at 220.

97. *Smith*, 494 U.S. at 890.

98. HAMILTON, *supra* note 1, at 229.

99. *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970).

100. *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). On the other hand, substantial deference is traditionally accorded to the decisions of prison administrators (in many constitutional contexts including religious freedom) in light of safety concerns that are also unique. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (holding that a regulation prohibiting prisoners from receiving hardcover books from any source other than a bookstore, publisher, or book club, was rationally related to a penological interests); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1973) (upholding a regulation curtailing prisoner involvement with a labor union).

government-created burdens”¹⁰¹—is perhaps a reference to the strong evidentiary basis in RLUIPA’s record justifying the accommodation; this may not distinguish it from the land use context.¹⁰²

Whatever the future holds for continuing congressional efforts at religious accommodation, Hamilton’s view that *Boerne* represents some sort of historic fulcrum or “culmination of U.S. legal principles”¹⁰³ seems to have been undercut to an extent by *Cutter* and by the Supreme Court’s recent decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.¹⁰⁴ Hamilton’s highly readable, though speedy, chapter on the history of religious accommodation in England and early America, emphasizing the decline of the moral authority of religious institutions (the iniquities in the name of the “religion of the realm,”¹⁰⁵ from the Inquisition to the Star Chamber to the Tower of London, are briefly recounted)¹⁰⁶ and the rise of the common law and the harm principle,¹⁰⁷ is aimed to cast the reasoning of *Boerne* and *Smith* as the apex of enlightened thought about religious accommodation. The focus of her final chapter, “The Path to the Public Good,” brings us to the crux of the matter.

101. *Cutter*, 544 U.S. at 720.

102. It may, however, distinguish it from the problems of “proportionality” that led the Court to strike down RFRA in *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997). The *Boerne* Court was troubled that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Id.*

On the oddity of this proportionality analysis of RFRA see Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 754-56 (1998) (arguing that the proportionality standard has not been applied to many other civil rights statutes). Professor Laycock represented Archbishop Flores in *City of Boerne*. *Id.* at 743.

103. HAMILTON, *supra* note 1, at 237.

104. 126 S. Ct. 1211 (2006). In *O Centro*, the Court considered the application of RFRA with respect to the federal government’s interest in enforcing the Controlled Substances Act against the religious use of a hallucinogenic tea, finding against the government at the preliminary injunction stage. The Court’s willingness in *O Centro* to entertain religious accommodation claims outside the context of prisons could suggest that RLUIPA’s section 2 is not as constitutionally infirm as Professor Hamilton might have hoped.

105. HAMILTON, *supra* note 1, at 253.

106. Hamilton gives the austere Calvinism of the founding era a free pass because of its allegedly justified pessimism about human nature, *id.* at 258-59, and its emphasis on the idea that “each person was given a job by God to fulfill,” which for the legislator is the pursuit of the public good. Marci A. Hamilton, *Republican Democracy Is Not Democracy*, 26 CARDOZO L. REV. 2529, 2533 (2005); *see also* Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411, 438-51 (2004).

107. HAMILTON, *supra* note 1, at 260.

III. THE PUBLIC GOOD

The single greatest difficulty with Hamilton's conception of the public good is that it does not adequately account for the reality, which she herself loudly proclaims, that religion is very important to many Americans. If that is so, it is likely that people for whom religion is important will feel that their religious beliefs can and should, at some level, shape the public good. Hamilton appears to concede this point.¹⁰⁸ Since religious convictions often do affect the citizenry's (including the legislature's) understanding of the public good, on what grounds does Hamilton criticize the introduction of those perspectives into the public domain?¹⁰⁹ Hamilton uses the concept of the public good throughout her book and, whatever else may be said about it, she is emphatic that it is vitally important and that religious belief *alone* should not establish its contours. In what follows, this review offers and explores a number of possible philosophical commitments that might support her theoretical claims.

A. *The Public Good as the Harm Doctrine*

Hamilton often invokes the concepts of the public good and the harm doctrine as if they meant roughly the same thing. For example: "[R]epresentatives must consider whether the liberty accorded is consonant with the no-harm rule. If so, the public good has been properly served. If not, the public good, and therefore the constitutional order, has been subverted";¹¹⁰ "In a republican form of democracy like this one, the laws are enacted to serve the larger public good, and no one should be permitted to harm another person without account";¹¹¹ "[T]he duties created by a democratic government—the law—are created for the purpose of furthering the public good, which is served when bad actors are deterred from harming others and punished if they do."¹¹²

The overlap between the harm doctrine and the public good is least controversial when one considers Hamilton's arguments about child

108. *Id.* at 293.

109. By posing the question in this way, I do not mean to suggest that there are no such reasons. I am simply interested in exploring Hamilton's reasons.

110. HAMILTON, *supra* note 1, at 279.

111. *Id.* at 8.

112. *Id.* at 278-79.

exploitation by religiously motivated persons.¹¹³ It seems intuitively reasonable and appealing to argue that the public good is advanced when the physical security of children is achieved at the expense of the “religious rights” of alleged child abusers. The same can probably be said of the interests of religious organizations to withhold documents or other information relevant to child abuse investigations and the interests of religiously motivated parents to withhold necessary medical treatment from their children. These are clear instances of substantial interests in physical security and health competing with less important interests.

Less obvious is a situation in which the safety of schoolchildren is measured against, say, the religious interest of a male Sikh student in carrying a ceremonial knife under his clothing.¹¹⁴ At first glance, the potential for substantial harm might intuitively outweigh the accommodation, but adequate precautions could be taken to limit considerably the occasions for physical harm. Naturally, the state has a compelling interest in the safety of its students and knife carrying does not sit easily with that interest, but Hamilton does not explain why various measures short of prohibiting the kirpan altogether could not serve the state’s interest just or nearly as well. For example, one court has suggested that the kirpan could be “blunted or dulled,” as well as sewn into a sheath, in order to protect the safety of students, and these are surely not the only possible measures to reach a religious accommodation while at the same time protecting student safety.¹¹⁵ It is not clear why Hamilton claims that “[o]nly a flawed legal doctrine would lead a court out on such a weak limb. Knives are knives, and children are not safe in their presence, no matter who they are.”¹¹⁶ A kirpan with a dulled edge and point, sewn into a sheath, and perhaps made of something other than metal might satisfy the religious and state interests. Knives may be knives, but to paraphrase Magritte, *this* is not a knife. It may be that a Sikh student would not accept such an adulterated kirpan but there may be compromises that the Sikh student could accept that would render the kirpan safe.¹¹⁷

113. It is therefore no surprise that in other recent work Hamilton emphasizes this particular context when analyzing the harm doctrine. See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1204-16 (2004) (“A Case Study of the No-Harm Doctrine: The Catholic Church’s Clergy Abuse Era”).

114. HAMILTON, *supra* note 1, at 114-18 (describing the kirpan, which can range in length from a few inches to as long as three feet).

115. *Cheema v. Thompson*, No. 94-16097, 1994 WL 477725, at *4 n.7 (9th Cir. Sept. 2, 1994).

116. HAMILTON, *supra* note 1, at 116.

117. The Supreme Court of Canada recently held that a school district could not prohibit a Sikh student from carrying a kirpan without violating the right of freedom of religion guaranteed by the Canadian Charter of Rights and Freedoms. *Multani v.*

The controversial edges of Hamilton's harm doctrine come into focus in some other contexts, particularly where the idea of physical harm does not apply. For example, Hamilton might say that legislative opposition to gay marriage harms homosexuals, in that it prevents them from enjoying marriage, "a social construct that must be determined in light of the common good, not by the reflection of any particular group's religious beliefs."¹¹⁸ One possible objection, raised earlier,¹¹⁹ would be that permitting homosexual marriage harms the institution of heterosexual marriage and those engaged in it. Hamilton might then reply that the objection is ill-taken because it injects religious belief into a secular debate, or because the objection inappropriately relies on religious reasons. It is difficult to see how Hamilton's harm principle would apply to this controversy.

"Anyone who advocates the Harm Principle owes us an account of harm"¹²⁰ What sort of harms count in Hamilton's calculus? In the context of religious accommodation, Professor (now Judge) Michael McConnell has written in support of the principle that "we are free to practice our religions so long as we do not injure others."¹²¹ Likewise, Professor Douglas Laycock recently stated that "some religious practices must be regulated or prohibited to prevent some significant temporal harm to others."¹²² Both of these writers, with whom Hamilton vigorously disagrees about the scope of religious accommodation, are making arguments that harm is a necessary condition for enforcement of laws that limit religious freedom; that is, absent the causing of some serious harm, legal regulation of the free exercise of religion is improper. Hamilton seems to be making the same claim. If all three

Comm'n Scolaire Marguerite-Bourgeoys, [2006] S.C.R. 6. It also held that the school district could not require the student to wear a plastic or wooden kirpan, which the student claimed would not comply with religious requirements, and noted that the student and his parents were willing to comply "with certain conditions to ensure that it was sealed inside his clothing." *Id.* at ¶3.

118. HAMILTON, *supra* note 1, at 67. I set aside Hamilton's question-begging assumption that marriage is solely a social construct.

119. See *supra* notes 51-54 and accompanying text.

120. R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 16 (2001).

121. McConnell, *supra* note 94, at 1128 (citing Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 289 (1982) ("[I]s there a real, tangible (palpable, concrete, measurable), non-speculative, non-trivial injury to a legitimate, substantial state interest?")).

122. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200 (2004).

advocate the harm principle, their considerable disagreements must derive from widely divergent applications of the doctrine.

In fact, the harm principle may no longer be a necessary condition for exercising the state's coercive power because "non-trivial harm arguments are being made about practically every moral offense."¹²³ Focusing on the existence or nonexistence of harm cannot answer the question of comparing harms. Nor can an emphasis on "conduct" as distinguished from "intentions" or "attitudes" neatly identify the type or category of harm that should concern us. As Professor R.A. Duff has explained in the context of his theory of punishment:

The harm suffered by the victims of central *mala in se* crimes (such as murder, rape, theft, violent assault) consists not just in the physically, materially, or psychologically damaging *effects* of such crimes but in the fact that they are victims of an *attack* on their legitimate interests—on their selves. The harmfulness and wrongfulness of such attacks lie in the malicious, contemptuous, or disrespectful intentions and attitudes that they manifest, as well as their effects.¹²⁴

If the harm principle ever served as a useful threshold determination, it no longer does so. Most allegations of moral harm now meet or at least claim to meet that threshold. For example, in Hamilton's land use discussion, we have already observed the clash and in some cases incompatibility of rival interests, such as those of residential neighbors, religious institutions and their potential adherents, and municipalities. All of these groups could plausibly claim to be harmed by political judgments antithetical to their interests.¹²⁵ No resolution to these conflicts is readily apparent by reference to the harm principle alone. "Balancing the harms" is similarly unavailing if the frame of reference for measurement is some undifferentiated, utilitarian version of the harm principle itself.¹²⁶ The interests at stake may not only be incompatible

123. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999).

124. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 128 (2001).

125. See Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1611 (2004):

[I]t is beside the point to argue against a doctrine of autonomy, as Professor Hamilton does . . . , on the ground that it will immunize churches from liability for direct batteries on unconsenting third parties—that is, for sexual abuse of children. These and other direct batteries have always been the paradigm case of conduct falling outside the free exercise of religion. Those who espouse the antiexemptions position must deal with the tougher cases—the plethora of modern laws that rely on the possibility of diffuse or distant harms to restrict behavior today.

Id. (footnotes omitted).

126. In legal circles, perhaps the most famous contemporary expositor of the harm doctrine was Professor Joel Feinberg. See, e.g., JOEL FEINBERG, HARMLESS WRONGDOING (1990). Feinberg's elaborate defense of the harm doctrine relies substantially on a

but also incommensurable. That is, there may be no way to decide between rival positions simply by measuring “harm,” or their respective potential for “good” or “pleasure,” for that matter.¹²⁷ How does one measure religious liberty interests against property interests, as gauged by their respective potential for harm? Nevertheless, Hamilton claims to have a clear view about where the public good lies by engaging in a straightforward application of the harm principle.

Hamilton also discusses circumstances in which the harm doctrine has little apparent relevance to discerning the public good. For example, Hamilton raises the relatively recent phenomenon of what she refers to as “religious prisons” and others have called faith-based rehabilitation programs, noting that “[t]here appears to be an increasing amount of evidence that suggests that some religious programming in the prisons can reduce the recidivism rate.”¹²⁸ Other than the possibility that inmates would be coerced by the state to participate in such programs against their will (which would certainly be a harm, but which Hamilton does not suggest is occurring), the “harm” to the participating offender caused by religion in these programs, as Hamilton has reported them, is difficult to locate.¹²⁹ In fact, Hamilton’s skepticism about the programs

distinction between harm to “rights” and harm that merely constitutes a “hurt” or an “offense”—what he also calls an “evil.” *Id.* at 45-51. On Feinberg’s account, only harm to rights, subject to certain caveats, is properly the subject of the harm doctrine. *Id.* at 38. Feinberg also gives more weight to “personal” than “external” harms, a distinction that to me seems tenuous. *Id.* at 59-64.

Hamilton refers in passing to Feinberg, HAMILTON, *supra* note 2, at 260, but she neither discusses nor adopts Feinberg’s involved theoretical distinctions to explain her own harm doctrine.

127. On the incommensurability of competing visions of, for example, justice and the good life, see generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 8 (2d ed. 1984).

Every one of the arguments is logically valid or can be easily expanded so as to be so; the conclusions do indeed follow from the premises. But the rival premises are such that we possess no rational way of weighing the claims of one as against the other. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds.

Id.

128. HAMILTON, *supra* note 1, at 165.

129. I put to the side Hamilton’s suggestion that the Christian emphasis of some of these programs “harms” other religious entities that might be interested in programs emphasizing their own faiths. *Id.* at 168. That is an argument for greater, not less, use of “religious prisons.” For a discussion of this and other questions concerning faith-based prisons, see Marc O. DeGirolami, *The New Religious Prisons and Their Retributivist Commitments*, 59 ARK. L. REV. 1 (2006).

derives from something other than their capacity for harm.¹³⁰ Thus, while a harm calculus is in some cases intuitively related to Hamilton's public good considerations, the harm doctrine taken in isolation severely underdetermines what she means to express by the public good.

B. The Public Good as the "Rule of Law" or "Ordered Liberty"

There is a kind of antagonistic symmetry in the title of the book from which one could reasonably infer that Hamilton is contrasting religious accommodation with the "rule of law": as "God" opposes "the Gavel," so "Religion" opposes the "Rule of Law." Hamilton often refers to the rule of law as closely related to, if not the same as, the public good. For example, "[t]hose who sacrifice the interests of women and children in the name of religion, or the rights of homeowners to religious landowners have imposed a system that demotes the public good to a secondary value. They have subverted the rule of law."¹³¹

Hamilton defines the rule of law as:

[A] canopy of mutual protection reached through legitimate legislative processes, under which all members of the society must abide by the same rules and observe the rule of no harm to others. The rule of law is diminished when individuals may use their personal beliefs to avoid the law and to harm others.¹³²

Hamilton's particular inspiration for her rule-of-law ideal as applied to religious accommodation derives from Justice Scalia's majority opinion in *Smith*: Otherwise neutral laws of general applicability whose incidental effect is to inhibit religious expression do not offend the First Amendment, the alternative being an anarchic system in which "each conscience is a law unto itself."¹³³

The venerable concept of the *rule of law* has been expounded in many ways. Ronald Dworkin, for one, focuses on the political use of force:

130. *Id.* at 168-69.

With the seemingly intractable problems in most prisons, the temptation to treat religious prisons as a cure-all is strong But prison systems cannot suddenly dispose of sensible criminology principles, according to most experts. For example, as important as constructive religion may be in reducing the recidivism rate, religious programming should not replace other factors that are also known to help, including counseling, drug and alcohol abuse treatment, and job instruction.

Id. Hamilton obviously attacks a straw man here (Has anyone actually suggested that "religious programming" should "replace" counseling in prison?) but, in any event, these claims have little connection to the harm doctrine.

131. *Id.* at 304; *see also id.* at 219 (praising scholars who opposed the "competing doctrine" of constitutional religious accommodation discussed earlier as defenders of the rule of law).

132. *Id.* at 303.

133. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990).

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

... This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the “rule” of law. It is compatible with a great many competing claims about exactly which rights and responsibilities ... do follow from past political decisions of the right sort and for that reason do license or require coercive enforcement.¹³⁴

There is obviously one aspect of the rule of law, captured by Dworkin’s position and shared by others,¹³⁵ that is procedural or “instrumental”;¹³⁶ laws should be clear, they should be validly enacted, they should be applied generally and consistently, and like cases should be treated alike.¹³⁷ Similarly, Professor Ronald Cass has listed four traits of the rule of law: (1) fidelity to rules, (2) of principled predictability, (3) embodied in valid authority, (4) that is external to individual government decisionmakers.¹³⁸ Hamilton certainly intends at least this procedural sense of the rule of law when she contends that “religious conduct must be governed by the same laws that govern the rest of us.”¹³⁹

This hardly ends the inquiry, however, because adherence to the procedural sense of the rule of law does not necessarily explain why interests in religious accommodation are “like” (all) other interests, and should be treated as such for rule-of-law purposes. In fact, there is *prima facie* constitutional evidence that religious free exercise interests are *not* “like” many other interests that the law might infringe upon or protect.¹⁴⁰ There is no constitutional limitation on lawmaking as to the rate of speed one may travel on a public road. A law that sets the speed limit surely infringes on one’s freedom of movement. Few would claim, however, that an interest in traveling as fast as one wants and an interest in practicing one’s religion freely are “alike,” in the sense that the government should bear the same burden to justify regulating either activity.

134. RONALD DWORKIN, *LAW’S EMPIRE* 93 (1986).

135. *E.g.*, LON FULLER, *THE MORALITY OF LAW* 38-39 (1969) (listing eight problems of an ambiguous or ineffective rule of law).

136. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 786 (1989) (interpreting FULLER, *supra* note 135).

137. *E.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* 208 (rev. ed. 1999) (“The rule of law also implies the precept that similar cases be treated similarly.”).

138. RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 4 (2001).

139. HAMILTON, *supra* note 1, at 310-11.

140. U.S. CONST. amend. I.

Is there, then, a more substantive sense of the rule of law that explains Hamilton's reliance on it to support her anti-accommodation argument? Some would answer no.¹⁴¹ Those answering yes do so by reference to a "point" or "reason" for the rule of law that Hamilton might dispute.¹⁴² For example, Professor Todd Zywicki has identified "constitutionalism" as "[t]he first value of the rule of law."¹⁴³ By this he means that "government power is constrained by 'the law,' an external force [by] which political decision-making must abide The rule of law enhances individual freedom by permitting individuals to choose and pursue their own ends in life, without improper influence from the state."¹⁴⁴ Thus, even those who subscribe to a more substantive vision of the rule of law ground their understanding of the public or common good on some concept, such as "constitutionalism," "liberty," or "human dignity," distinct from the rule of law.¹⁴⁵ Hamilton cannot use the rule of law itself synonymously with her conception of the public good.

141. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 211 (1979) ("If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy."); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137 (2002).

142. E.g., FINNIS, *supra* note 43, at 270-76 ("Individuals can only be *selves*—i.e. have the dignity of being 'responsible agents'—if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a 'lifetime.'"). For Finnis, the rule of law is thus a mechanism, valuable on its own terms, that helps to ensure that government assists its subjects in pursuing the good life as he envisions it. Even Finnis recognizes, however, that "the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good." *Id.* at 274.

For Rawls, the procedural rule of law was intimately connected with the concept of liberty, which is itself critical to his central idea of justice as fairness, RAWLS, *supra* note 137, at 210-13, but Rawls also felt that breaches of the rule of law would sometimes be necessary to protect against greater deprivations of liberty that would occur if the rule of law were observed. *Id.* at 213. It is possible that Hamilton would agree with this position, but not likely since her view of the rule of law seems to admit little exception.

143. Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *SUP. CT. ECON. REV.* 1, 4 (2003).

144. *Id.* at 4, 7.

145. See Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 *GEO. WASH. L. REV.* 149, 152 (1987).

There is no question that the rule of law is a necessary condition for a sane and just society. The fear of discretion that is shared by both [A.V.] Dicey and [Friedrich] Hayek is well grounded by the more explicit modern treatment of property rights, which shows that ill-defined property rights lead to legislative intrigue, political favoritism, and massive uncertainty, all of which tend to reduce the levels of both liberty and utility. But if the rule of law . . . is necessary for a just and sound society, it is a very different question to ask whether it is *sufficient* to achieve that result. . . . [T]he choice of the best, even the best achievable, form of political organization demands more than faithful adherence to the rule of law can provide.

Id.

Many of the same points may be made of Hamilton's use of the phrase "ordered liberty" in connection with the public good in this book and elsewhere: for example, "Judicial deference to the military in prisons is not the end of religious liberty; it's just ordered liberty";¹⁴⁶ "The liberty that is consonant with the public good is ordered liberty, which takes into account both liberty and the public good."¹⁴⁷

The phrase "ordered liberty" has a rich and controversial constitutional history that Hamilton oddly does not mention, including its memorable use in *Palko v. Connecticut*¹⁴⁸ and its progeny. Perhaps she omits such a discussion because her concept of ordered liberty has little to do with advocating special protections for constitutional rights, and more to do with a muscular view of government power. "Ordered liberty" was also used by Chief Justice Burger in his majority opinion in *Bowen v. Roy*.¹⁴⁹ Faced with a free exercise challenge, the Supreme Court in *Roy* upheld a federal statute that required a state agency to use a social security number in administering certain programs, notwithstanding the claim that use of the number would violate plaintiffs' Native American religious beliefs.¹⁵⁰ Chief Justice Burger offered this rather uninformative statement about ordered liberty:

The First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government.¹⁵¹

As an explanation of the substantive principle of "ordered liberty," this statement offers little in the way of guidance. To the extent that it does, however, the principle of ordered liberty is used in *Roy* as an argument in the service of greater, not less, religious freedom.¹⁵²

146. HAMILTON, *supra* note 1, at 172.

147. Hamilton, *supra* note 113, at 1105 (footnote omitted).

148. 302 U.S. 319, 325 (1937) (holding that due process protects citizens against state interferences with rights, such as the free exercise of religion, that are "implicit in the concept of ordered liberty"), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 793-94 (1969) (holding the Fifth Amendment's double jeopardy standard applicable to state criminal trials).

149. 476 U.S. 693 (1986).

150. *Id.* at 695-96, 698-99.

151. *Id.* at 701-02.

152. On the other hand, Chief Justice Burger spoke vaguely of "ordered liberty" as an *anti*-accommodationist principle in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) ("Although a determination of what is a 'religious' belief or practice entitled to

On Hamilton's concept of ordered liberty and its association with the public good, Professor Carl Esbeck's criticisms merit lengthy reproduction:

Certainly a republic needs "ordered liberty," and no one responsible argues to the contrary. But the American republic is also about limited government. Achieving [Hamilton's] goal of the "public good" requires balance. That is, neither church nor state is absolute, and there are some matters concerning which neither can legitimately invade the space of the other. Professor Hamilton's argument assumes the very issue in debate rather than addressing it. No one is pressing for immunity for religious institutions from the rule of law to the detriment of the public good. Rather, the debate involves defining the contours and limits of the public good. Who gets to decide what is good for the public? When does a pluralistic secular society have to live without a singular rule of law in order to accommodate the multiple opinions of what the rule ought to be? Who gets to decide what it means to be a bishop, how he is to go about doing his job, how intensely must he supervise the priests in his charge? [Hamilton] obviously is outraged by the Catholic Church sex abuse cases (who isn't?), but the imposition of both criminal and tort liability in that worst of all cases does not explode the idea of church autonomy. Rather, it is just a clarification of the location of the church-state boundary such that the state may impose liability in the extreme cases of abuse.¹⁵³

Of course it is true that the concept of ordered liberty, like the rule of law, "help[s] individuals and groups know how they may go about pursuing their purposes under the law's protection."¹⁵⁴ But ordered liberty and the rule of law are merely starting points, fixed numbers in the complicated equation that may or may not produce the public good; by themselves they tell us very little about the substantive content of Professor Hamilton's beliefs as to where the public good actually lies.

C. *The Public Good as a Legislative, Not Judicial, Function*

In theory, Hamilton thinks that the legislature is institutionally superior to all other government branches when it comes to deciding on the proper scope of free exercise.¹⁵⁵ Hamilton emphasizes a few noteworthy structural virtues of the legislative process—the ability to

constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." (footnote omitted)).

153. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early Republic*, 2004 BYU L. REV. 1385, 1581 n.710 (2004). Esbeck is responding to Hamilton's symposium contribution, see Hamilton, *supra* note 113, which she has said forms the basis for some of her conclusions in *God vs. the Gavel*. HAMILTON, *supra* note 1, at ix.

154. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 15 (2001). Macedo continues: "Liberal constitutional institutions have a more deeply constitutive role than the rule of law ideal signifies: they must shape or constitute all forms of diversity over the course of time, so that people are satisfied leading lives of bounded individual freedom." *Id.*

155. See, e.g., HAMILTON, *supra* note 1, at 212, 275, 285, 295-98.

take voluminous testimony pertinent to the particular issue, to consider a wide variety of sources, to reverse or modify prior enactments, and “to reject facts and theories presented to them”¹⁵⁶—that render it the preferred forum for public good determinations. There are many others.¹⁵⁷

The practical difficulty for Hamilton is her frequent disappointment with actual legislative decisions that ostensibly aimed at the public good in the religious accommodation context, as well as her assessment of Congress’s bloated delusions of grandeur in the twentieth century.¹⁵⁸ Still, we have at least gone a short distance in defining Hamilton’s concept of the public good: we have concluded that it is exclusively a legislative consideration, or perhaps that it is the legislature’s prerogative to assign it in its discretion. Nevertheless, though we may have descried the locus of its determination, we surely have not yet encountered a full explanation of the public good’s content. Our next eligible interpretation builds on the legislative focus, drawing on the implications in Hamilton’s statement that “[a]ll legislative judgments should include consideration of the public interest in order to achieve the ideals of a *republican* form of government.”¹⁵⁹

D. The Public Good as Legislative Civic Republicanism

The tradition and not-so recent¹⁶⁰ revival of civic republicanism is much concerned with the “public good” as a model for political

156. *Id.* at 296-98. At least the last of these is overstated as a distinction from the judiciary. Courts *do* have the power to disregard “facts” and frequently do so, for example, when they make credibility determinations or rule on the admissibility of evidence.

157. See, e.g., Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 655-59 (1995) (discussing the procedural formality of legislative rules, the considerable size of most legislatures, and the diversity of members’ backgrounds as important institutional qualities in fulfilling the legislature’s deliberative obligations).

158. HAMILTON, *supra* note 1, at 227 (“From the 1930s until 1995, the Supreme Court systematically deferred to congressional exercises of power. The result was an unaccountable, headstrong Congress that sincerely believed it held plenary power over all issues, despite the plain meaning of the Constitution’s structure and language limiting its powers.”).

159. *Id.* at 300 (emphasis added).

160. See Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman’s “Strange Career” and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1025 (1998) (book review) (“In the mid-1980s, it was still breaking news in the legal academy that the Lockean tradition of classical liberalism and individual rights was not the only conception of politics to have shaped the ideas and actions of American political actors and lawmakers.”).

decisionmaking, especially as contrasted with the view that decisions are best made by aggregating private preferences resulting from “deals” among self-interested groups.¹⁶¹ Much of the religious accommodation that Hamilton decries can be explained by reference to a kind of faith in an idealized legislative civic republicanism—the hope that “the elusive voice of the public good, momentarily audible above the din of power politics, carries the day.”¹⁶² Hamilton refers positively, in passing, to legislative civic republicanism as a theory that might support her ideas about accommodation.¹⁶³ She yearns for the “right sort” of legislator: “What is desperately needed in Congress is some member who can rise above religious lobbying to secure the larger good—members that at least ask if there is another side to an issue raised by a religious entity, without being its servant.”¹⁶⁴

In laying out her arguments for legislative civic republicanism, Hamilton contends that the U.S. legislature is not a majoritarian institution. Once the majority elects its representatives, “[t]he system simultaneously frees the representatives to do what is best for the country—even if the people do not fully comprehend the issues or agree on the course taken—but it also imposes the difficult burden on elected representatives to make independent decisions in the larger public interest.”¹⁶⁵ As proof, Hamilton offers the racially prejudiced public mood of the 1960s.¹⁶⁶ The sentiments then prevalent, she argues, did not prevent the federal government from enacting legislation to protect racial and other minorities. Neither have they prevented the agendas of “lobbyists representing the disabled, and homosexuals, and racial

161. Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1447 (2005).

162. *Id.*; see also Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 18-19 (1986).

Republicanism’s “animating principle” is said to be civic virtue. Civic virtue is in turn defined as “the willingness of citizens to subordinate their private interests to the general good.” Cultivation of this public spirit is “government’s first task.” Republicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion, partly for the sake of nourishing civic virtue.

Id. (citations omitted) (quoting GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 5 (1986)); see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-57 (1988) (discussing the four common commitments of civic republicanism—deliberation, political equality, universalism, and citizenship).

163. HAMILTON, *supra* note 1, at 206.

164. *Id.* at 155-56.

165. *Id.* at 284. Hamilton is only interested in the model of civic republicanism with respect to the legislature. She does not champion the popular civic virtue of Montesquieu. Indeed, she is actually opposed to the model with respect to the populace at large. See Hamilton, *supra* note 106, at 2533 (arguing that public majorities should have little, if any, influence in guiding the political agenda).

166. HAMILTON, *supra* note 1, at 284-85.

minorities” from faring better in Congress than those of “amorphous majorities.”¹⁶⁷

Hamilton’s prior writings about legislative antimajoritarianism indicate that perhaps we are on the scent of Hamilton’s public good. For Hamilton, the dangers of popular self-rule are allayed by the Constitution’s “delegation of decision making” responsibility to the legislature.¹⁶⁸ Mob rule is averted because “[r]epresentatives are free of their constituents’ instruction as they are simultaneously driven to consider the public good in a fishbowl of public scrutiny within which they operate and seek reelection.”¹⁶⁹

Hamilton’s belief in legislative civic republicanism is challengeable on many fronts, space for the development of which is not possible here. Most glaringly, her faith in the possibility of an ideal legislator, unsullied by the whispers and tugs of special interests, is perhaps the most confounding part of the book. Hamilton appears to have traded in one set of rose-colored glasses for another. Though she grudgingly acknowledges that legislatures often fail to perform their duties in the way that she conceives them,¹⁷⁰ she nevertheless insists that individualized decisions by legislatures about accommodation are best suited to serve the common good. Whither her Calvinistic pessimism,¹⁷¹ so prominent when the topic was the abuses of religion or the oppressive instincts of the general populace?

Yet even if (1) we assume that legislators are capable of performing consistently in the ways that Hamilton suggests; and (2) we accept her highly controversial point that the legislature can and should often act in an antimajoritarian fashion; and (3) we also accept her somewhat contradictory statements about the value of “pluralism” in American society,¹⁷² we are simply left with another claim about the institutional

167. *Id.*

168. Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387, 419 (2002).

169. *Id.* at 434.

170. HAMILTON, *supra* note 1, at 279-80. Indeed, a great part of this book provides evidence of legislative failures on just this front.

171. *See supra* note 106.

172. Hamilton praises American “pluralism” as a laudable cultural quality, HAMILTON, *supra* note 1, at 66, but seems not to consider that it may be precisely that pluralism that generates the multiplicity of very different views of the public good (including those held by members of the legislature), many of which are infused with some degree of religious belief. Indeed, it may fairly be said that her civic republican and pluralist impulses are in considerable tension, theoretical as well as historical. *See*

superiority of the legislature, now advocated as a matter of constitutional design, to other institutions as the voice of the public good. If the point is to justify legislative civic republicanism as a theory of the substantive public good—that is, to claim that the constitutional structure itself advances the public good—citing a few examples where the structure may have coincided with what is for Hamilton the right result will not do. As Hamilton herself is fully aware, there are at least as many examples where she believes the result was wrong. If the public good is to have any substantive content, the model of legislative civic republicanism cannot provide it.

E. The Public Good as Policy Preference

The preceding sections examined four possible overarching commitments that might have supported Hamilton's public good, ones that she herself intimated were closely related to the concept. None of them was successful. Perhaps the problem is that Hamilton perceives the public good as a much more pragmatic affair. On this view, each legislator is simply to choose whatever policies she prefers, free from untoward influences, of course, given any particular set of circumstances. Laws that provide categorically for religious accommodation, as any other categorical law, limit the legislator's freedom to decide as she wills.

There is no doubt that Hamilton favors certain policies over others, and prefers many policies over those that advance religious accommodation. For example, religious accommodation is less important to her than historic preservation,¹⁷³ preventing the spread of AIDS in Africa,¹⁷⁴ clarity with respect to issues of child custody and inheritance,¹⁷⁵ the right of homosexuals to marry,¹⁷⁶ and the interests of residential homeowners

David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1706 (2005) (tracing the rise of theories of "participatory" and then "deliberative" democracy, including civic republicanism, as explicit reactions against the older theories emphasizing pluralism). Professor Sklansky has these relevant comments on the deep divisions between the two theories:

Theories of . . . deliberative democracy reject the pluralists' reliance on leadership elites, group competition, and periodic elections. They insist on the centrality of what pluralism scorned: widespread political participation [T]he cultural patterns they emphasize are different: instead of bargaining and adherence to "rules of the game," we have . . . a commitment to reason and civility (in the case[] of civic republicanism . . .)

Id. at 1769. Again, Hamilton does not favor civic republicanism on a broad, popular scale, but she argues for something very much like it with respect to the legislature.

173. HAMILTON, *supra* note 1, at 94.

174. *Id.* at 76.

175. *Id.*

176. *Id.* at 65.

in maintaining their neighborhood characters.¹⁷⁷ However, religious accommodation may not be the bottom rung: she may perhaps favor religious accommodation over certain claims of educational disruption¹⁷⁸ and the military's interest in esprit de corps and unity.¹⁷⁹

The difficulty with this particular theory of the public good is not that it relies on legislators' (or Hamilton's) policy preferences. Indeed, we have been searching for some substantive content to give shape to Hamilton's conception of the public good; policy preferences of one kind or another are a promising candidate for this task. In fact, Hamilton is at her most candid when she argues for her own policy preferences, perhaps indicating that her personal beliefs rather than any grander theory often drive her impassioned rhetoric about the public good.

Rather, the difficulties with this approach are twofold. First, Hamilton has not explained why the particular policies that she favors should be universalized in the name of the "public good." That is, if what she wants is that the legislator be free to enact her (the legislator's) policy preferences, how can Hamilton claim that a religiously inclined legislator, or one who favors religious accommodation, should instead share her (Hamilton's) own view of the public good? Second, a theory of simple policy preferences does not account for Hamilton's particular skepticism about the value of religious belief and accommodation in the public good calculus. That skepticism requires closer inspection.

IV. THE PUBLIC GOOD AS THE EXCLUSION OR DEVALUATION OF CERTAIN RELIGIOUS INTERESTS

It should by now be clear that Hamilton harbors a special distrust of certain religious interests. Indeed, perhaps the principal merit of *God vs. the Gavel* is its often harrowing portrayal of the abuses of religious organizations in contemporary American culture and its clear-eyed examination of the considerable power religious advocates and lobbyists wield before Congress. Does Hamilton believe that religious interests could ever play a role in shaping her public good? In fairness, Hamilton frequently gestures in the direction of acknowledging some role for religious views. But her comments on this front are resigned. She says that religion is too deeply entrenched in the American psyche to be

177. *Id.* at 89.

178. *Id.* at 130.

179. *Id.* at 171.

entirely extricated from the debate over the public good.¹⁸⁰ For Hamilton, religion is everywhere, “inescapable,” and cannot be ignored.¹⁸¹

We are looking for a conceptual framework for understanding the type of religious beliefs and interests that Hamilton would exclude from the sphere of public judgment, and the type of religious beliefs and interests that she feels should be given no greater weight than any other beliefs or interests. Hamilton certainly favors religious liberty of a kind. She opposes laws that display patent animus toward particular religions,¹⁸² and supports the freedom to speak and believe as one wills.¹⁸³ However, she also claims that certain religious interests have no legitimate place in the sphere of public debate and she opposes giving special weight to religious beliefs when those beliefs run up against other interests that government might deem legitimate.¹⁸⁴

In order to understand better Hamilton’s public good, we need to examine more closely and distinguish among the relevant kinds of religious interests that she might or might not admit to the sphere of deliberation over the public good. A return to some of Professor Greenawalt’s fine divisions is useful. A religious interest is, first, “religious”: if we accept, for this purpose, Greenawalt’s broad and highly inclusive definition, religion’s source lies in some kind of “theistic belief or other belief about a realm of ultimate value beyond, or deeper than, ordinary human experience.”¹⁸⁵ Second, it is an “interest”: the holder of the religious belief wishes to do something with it. He may simply wish to believe it silently; or he may wish to impose it as a law binding on himself and everyone else; or he may wish to do a host of other things with it.

At one extreme of the possible range of religious interests lies what Greenawalt has called the imposition of comprehensive religious beliefs.¹⁸⁶ If Donna is a Christian whose political judgments are shaped entirely by her belief in the literal truth of Holy Scripture as the received will of God, Donna has a comprehensive religious belief. Suppose that Donna is a legislator and votes for a law that would establish Christianity, as she understands it, as the supreme law of the land and would outlaw all other religious beliefs. Her interest is one of imposition. I believe that

180. *Id.* at 292-93.

181. *Id.* at 288, 292-93.

182. *Id.* at 214-16 (describing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)).

183. *Id.* at 26.

184. *Id.* at 287-88.

185. GREENAWALT, *supra* note 45, at 39.

186. *Id.* at 58.

Professor Hamilton,¹⁸⁷ like most people, would oppose such a religious interest; she would want to exclude it from consideration of the public good.¹⁸⁸ If Donna, holding the same comprehensive religious views, voted to pass a law outlawing gay marriage for the single reason that homosexuality is anathema to God's will (that is, the imposition of a particular religious belief by one who holds a comprehensive religious view),¹⁸⁹ Hamilton would likely argue not only that the putative law is unsound but also that Donna's views should be excluded from the public good calculus.¹⁹⁰

Suppose, instead, that Phyllis's reasons for voting for the ban on gay marriage derive both from her religious convictions and from her views that the institution of homosexual marriage cannot be rationally defended. Her underlying grounds are partly religious; she believes that homosexual marriage is inconsistent with God's will. But by opposing homosexual marriage she does not wish to impose her religious views on anyone else because, in addition to her religious reasons, she also feels strongly that the institution and traditions of heterosexual marriage, and the secular human goods that it serves, are harmed if gay marriage is not officially prohibited. Suppose that she is able to adduce what for her are principled arguments about gay marriage's deleterious effects on the institution of heterosexual marriage as well as other data that *could* support her secular belief in the harm of homosexual marriage.¹⁹¹ I believe that Hamilton would exclude this religious interest from public good considerations as well. Even if Hamilton might agree that there are some legitimate, nonreligious reasons for supporting the ban, which is doubtful,¹⁹² she would claim that the reliance on a religious reason *in*

187. In what follows, I attempt to divine Professor Hamilton's position on a number of hypothetical situations on the basis of her claims in *God vs. the Gavel*, in an effort to pinpoint her public good doctrine. I have no reason to know whether Professor Hamilton would actually agree with the positions staked out for her.

188. "Exclusion" might entail formally admitting the view, but giving it very little or no weight as a practical matter.

189. It makes no difference what Donna's publicly expressed views are (for example, that homosexuality is irrational or harmful to some secular good, et cetera) if Donna's true reasons for supporting the law stem from religious conviction.

190. HAMILTON, *supra* note 1, at 50 ("The hard choices depend on a more broad-ranging inquiry than any one religious worldview encompasses (even when that perspective is shared by a significant number of individuals and institutions).").

191. I assume, for the sake of this argument, that Phyllis's arguments could withstand some scrutiny, though they need not be iron clad for her to be persuaded by them.

192. *Id.* at 52-66.

this case is the overwhelming impetus for the law. If the law were passed, it would compel “nonbelievers to conform to a standard of conduct inspired in large measure by religious belief,”¹⁹³ which amounts to a religious imposition. It is important to emphasize that Hamilton’s reasons, as I hypothesize them, for excluding or giving very little to no weight to this religious interest would have little to do with what Phyllis believes about her (Phyllis’s) position; they instead implicate solely what Hamilton (or the ideal legislator) believes about those views.

One further illustration: Lisa believes that animals should not be treated inhumanely. Her reasons for supporting a farming regulation governing the decent treatment of animals before they are slaughtered stem in part from her belief that the Bible demands concern for animals. However, she also is persuaded by secular arguments that animals deserve a high degree of respect from humans. She has no wish to see the law pass in order to impose her religious views on those that do not share them. She believes the law is just because she cares about animals and her reasons are mixed.¹⁹⁴

Structurally, Phyllis’s and Lisa’s positions are identical. Both have religious interests. Neither wishes to impose her religious views on others. Each supports (or believes that she supports) the prospective law in question for both religious and secular reasons. Being religious themselves, both would find it exceedingly difficult to disentangle and cull out the religious from the secular reasons for supporting the respective laws. As Professor Steven Smith has said, “[t]he religious citizen supports not two severable propositions but rather the single, complex proposition that secular and religious influences must both play a part in public decisions.”¹⁹⁵

Nevertheless, I believe that Hamilton would draw a distinction between the two positions. Though she would exclude Phyllis’s religious interest from the domain of the public good, she would admit Lisa’s. Her reason would be that, *in this context*, the religious interest is reasonable because it closely aligns with legitimate secular interests. “Citizens may speak from the heart and soul, but it is up to our elected officials to contextualize the debate by adding the scope of the public good to all public consideration.”¹⁹⁶ By “contextualize the debate,” Hamilton means that the ideal legislator should analyze the religious interest from a secular

193. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 184 (1991).

194. I owe the framework for this hypothetical to Professor Greenawalt. GREENAWALT, *supra* note 45, at 58-59.

195. Steven D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1010 (1989).

196. HAMILTON, *supra* note 1, at 51.

standpoint to determine whether it aligns with the legislator's determination of the public good. In Lisa's case, the ideal legislator should consider her religious belief in light of the larger context of secular reasons for the humane treatment of animals, balancing these against opposed interests, in determining the public good. Hamilton would not give any more weight to Lisa's religious reasons than to other secular reasons, whether supporting or opposing the law. But she would include them in the calculus because they can be squarely reconciled with convincing secular arguments in favor of her position.

This is close to a skeptical or "prudential"¹⁹⁷ argument for simple, secular policy preferences. But it differs in an important way: it is a full-bodied belief in (or theory of) the ability of *the legislature* to conduct an individuated inquiry and determination of the reasonableness, by secular lights, of particular religious interests. For Hamilton, whether religious interests can play a role in the public good will depend on their compatibility with what the ideal legislator deems legitimate secular interests. If they are highly compatible, the ideal legislator can include the religious interest as one more reason in his assessment of the public good. If not, the religious interests are best excluded.

All of this—indeed, the entire tone and argumentation of the book—reinforces the exquisitely particularized quality of Professor Hamilton's public good theory and her seemingly limitless faith in the powers and capabilities of legislators. It also grossly overestimates the number of difficult moral and social issues that can be resolved satisfactorily by reference to secular objectives alone. "[E]veryone must reach beyond commonly accessible reasons to decide many social issues and . . . religious bases for such decisions should not be disfavored in comparison with other possible bases."¹⁹⁸ "Everyone" presumably includes legislators, even idealized ones, as Greenawalt cautiously acknowledges.¹⁹⁹

197. *E.g.*, STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 99-117 (1995). Professor Smith argues that, even if one accepts the dubious proposition that the religion clauses and the Constitution generally establish an avowedly secular regime, secular rationales leave the value of religious freedom to "prudential" or contextual concerns, which are incapable of being expounded by any unifying theory.

198. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 113 (1988).

199. Greenawalt notes:

When we turn to legislators relying on their own convictions, the place of religion is more controversial. As a public representative in a state that is separated from religious organizations, perhaps the legislator should eschew

Hamilton's generally dim view of religious interests in the numerous examples that she provides bespeaks a strong disinclination to countenance them in deciding what is good policy, an aversion so powerful that it blinds her to the considerable legislative abuses that she recounts. The accommodation of religious interests, she believes, often tends to do more harm than good. For example, Hamilton argues that expansive religious accommodation is more likely to lead to strife, interdenominational and otherwise, itself inconsistent with the public good, than an approach that treats religious interests no differently than any other interest.²⁰⁰ This view is especially evident when Hamilton discusses land use conflicts, where she claims that religious organizations have sued to enforce their rights under RLUIPA "[i]nstead of finding a middle ground" with their opponents.²⁰¹ The view also appears when Hamilton claims that religious accommodation somehow injects discrimination into a dispute where it would not otherwise exist, making rational, cool-headed, and just resolutions that would "serv[e] everyone's interest" more difficult.²⁰² In fact, however, Hamilton points to no evidence that religiously motivated strife in contemporary America is more rampant, noxious, or divisive than strife of any other kind.²⁰³

In the end, Hamilton's view of the public good is best characterized as one in which religious interests might shape policy, but only if they can be justified to a high degree by secular reasons. Her profound

reliance on religious premises insofar as he can. Everything I have said so far indicates how hard this might be to accomplish, but nonreliance might at least be held up as an ideal.

Id. at 237.

In the face of Greenawalt's arguments, I am less persuaded that *total* nonreliance is ideal. In fact, in what follows, Greenawalt himself does not argue for total nonreliance, but identifies certain nuances, for example, intensity of conviction and notions of serious wrongs, *id.* at 238, that might affect the propriety of reliance on religious belief.

200. See Hamilton, *supra* note 113, at 1216. As a practical matter, it may be that Hamilton would accept some consideration of religious interests in developing policy. But her reasons for doing so would not be the belief that decisions favoring religious interests sometimes advance the public good; instead, she might countenance religious interests because so many people find religious reasons to be important.

201. HAMILTON, *supra* note 1, at 101.

202. *Id.* at 94 ("The best result in every land use dispute is the win-win result."). This observation is probably as true as it is practically useless.

203. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 231 (2001) ("American history does not suggest that religiously grounded arguments about controversial political-moral issues—racial discrimination, for example, or war—are invariably, or even usually, more divisive than secular debates about those issues." (footnote omitted)); see also Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded From Democratic Deliberation*, 1999 UTAH L. REV. 639, 643 (1999) ("[T]he supposed divisiveness, intolerance, and absolutism of religious argument neither distinguishes it from secular ideology nor provides a justification for exclusion from democratic politics . . .").

disillusionment with the moral authority of religious organizations and persons left her seeking a repository for her conviction that somebody, or some entity, should be acting in the public interest. With plausible constitutional reason, she has selected the legislature to be the bearer of her trust. But the task she has assigned to it—to decide, case-by-case, whether specific religious interests deserve government protection by reference to their secular worth—is beyond both the legislature’s institutional abilities and its members’ personal capacity for moral judgment.

